76-8161

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1976

No. _____

KRISTINA KAY HAYDOCK,

Petitioner,

vs.

CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF VENTURA

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Counsel for Petitioner

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(No opinion, published or unpublished.)

TO THE HONORABLE WARREN E. BURGER, CHIEF JUSTICE OF THE UNITED STATES, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

COMES NOW, KRISTINA KAY HAYDOCK, by her attorney IRVING A. KANAREK, ESQ., member of the Bar of the United States Supreme Court, asking for a Writ of Certiorari directed

to the Appellate Department of the Superior Court of California for the County of Ventura to review that certain judgment (without written opinion, published or unpublished), filed which affirmed her conviction in the Ventura County Municipal Court of the State of California. (Both timely petition for rehearing and request for certification to the California Court of Appeal, Second Appellate Distrct, were denied.)

Pursuant to Rule 23, Rules of the Supreme Court of the United States, petitioner submits the following:

I
OPINION BELOW

The judgment on appeal in People v. Haydock was rendered on September 28, 1976. A copy of this judgment is appended to this Petiton as Appendix A; a copy of the ORDER DENYING PETITION FOR REHEARING AND REQUEST FOR CERTIFICATION dated October 13, 1976 is appended hereto as Appendix B. There was no written opinion published or unpublished.

II
JURISDICTION

The grounds upon which the jurisdiction of this Honorable Court is involved are:

(i) The date that the trial court judgment occurred was July 1, 1975; timely appeal was denied on September 28, 1976 (Appendix A).

(ii) Timely petition for rehearing and request for certification to California Court of Appeal, Second Appellate District, were each made and each denied on October 13, 1976 (Appendix B).

(iii) The statutory provision conferring jurisdiction on this Honorable Court is 28 U.S.C. 1257 (3) which provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> ". . . By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929."

Jurisdiction of this Honorable Court is further invoked because the Appellate Department of the Superior Court of California for the County of Ventura has decided a major federal due process question in a way not in accord with

applicable decisions of this Honorable Court concerning the necessity in criminal offenses of a requirement of presence of some mental state of the defendant implying responsibility for crime as an element thereof and the necessity of a jury instruction on criminal intent. Felton v. United States, 96 U.S. 699, 24 L.Ed. 875; Morisette v. United States (1952) 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288; Lambert v. California (1957) 355 U.S. 225, 78 S.Ct. 240, 2 L.Ed.2d 228; Smith v. California (1959) 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205; and all of the cases and authorities cited therein, especially: Sayre, Public Welfare Offenses, 33 Col. L. Rev. 55; Hall, Prolegomena to a Science of Criminal Law, 89 U. of Pa. L. Rev. 549; Radin, Intent, Criminal, 8 Enc. Soc. Sci. 126.

Certiorari is sought to require and insure that California state courts adhere to the mandates of this Honorable Court in administering and interpretating state penal statutes involved so as to comport with the due process clause of the Fourteenth Amendment to the United States Constitution; or make a finding such penal statutes are unconstitutional, void and unenforceable.

Also at issue is whether the Federal harmless error rule of Chapman v. California, 386 U.S. 18 and Fahy v. Connecticut, 375 U.S. 85 can be so applied as to deprive the jury of the opportunity of evaluating the evidence and credibility of prosecution witnesses on the issue of the mental state element of a crime.

It is to be emphasized that the trial judge has, since the adverse verdict, denial of motion for new trial herein, and affirmance on appeal, denied petition for rehearing and denial of certification to the California Court of Appeal expressed uncertainty with respect to his rulings on the above-mentioned issues and a desire that they be settled by authoritative opinion of this Honorable Court; and that the prosecution, in its brief filed with the Appellate Department of the Superior Court of California for the County of Ventura has admitted the necessity of a jury instruction defining the mental element of the crime of which petitioner was convicted (arguing that the evidence produced as to said mental element was such that the error in failing to give such instruction was harmless).

It is to be noted in this regard that by failing to issue a written opinion, the Appellate Department of the Superior Court of California for the County of Ventura has left in doubt both issues.

Because this case involves fundamental issues of due process with respect to the necessity of a mental element in every crime, at least to the extent of defining responsibility of the defendant therefor, and with respect to the power of the trial judge to withdraw the mental element issue from the jury's consideration, and because the appellate decision herein leaves such issues in doubt, this is a case of national consequence and importance and certiorari should be granted.

III
QUESTIONS PRESENTED FOR REVIEW

1. Whether a state criminal statute which imposes a mandatory, minimum 90 day jail sentence upon conviction (allowing the sentencing judge no discretion to suspend sentence or grant probation without imposing said sentence or otherwise dispensing with such minimum punishment) if the accused is found to be in a certain physical condition (the physical condition of being under the influence of any one of a list of hundreds of specifically defined chemical substances) but is silent as to whether or not any particular state of mind must accompany or precede being in that physical condition, can be so interpreted by the state courts as not to require at least implicitly some intent or knowledge or other state of mind indicating personal responsibility of the accused for being in that condition without violating the imperatives of the due process clause of the Fourteenth Amendment to the United States Constitution and thereby rendering the statute unconstitutional, void and unenforceable.

2. Whether any state of the evidence, no matter how purportedly strong in favor of guilt it appears to be to the trial judge (or the reviewing appellate tribunal), justifies the trial judge in withdrawing from the jury's consideration the issue of the mental element of the crime indicating the accused's responsibility therefor by refusing to give an appropriate jury instruction

without violating the fair jury trial imperatives of the Sixth Amendment to the United States Constitution as made applicable to the several states by the Fourteenth Amendment to the United States Constitution.

IV
UNITED STATES CONSTITUTIONAL AMENDMENTS INVOLVED

Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Fourteenth Amendment

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein

they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

V
STATE STATUTES INVOLVED

California Health and Safety Code, Section 11550 and California Vehicle Code, Section 36105 are set out verbatim in Appendix C.

VI
STATEMENT OF THE CASE WITH EVIDENCE MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

Petitioner was charged in the Ventura County Municipal Court of the State of California with a violation of California Health and Safety Code Section 11550. She had a jury trial and the only issue given to the jury was whether she had been under the influence of a dangerous substance, i.e., no instruction was given the jury defining "use" within the meaning of the statute.

The prosecution proposed and then withdrew a standard jury instruction on criminal intent. Petitioner proposed and the trial judge rejected jury instructions on criminal state of mind, including a requirement that knowledge of the nature of the substance causing petitioner to be "under the influence" be part of the criminal state of mind. The trial judge refused to give and did not give any jury instructions whatsoever related to the criminal state of mind or intent of petitioner as being an essential element of the crime to be proved by the prosecution, or to state of mind or intent at all.

Defendant was found guilty and sentenced to the minimum possible sentence under the law, i.e., 90 days in the county jail (a mandatory minimum). Her motion for new trial was denied and her appeal was denied without written opinion; timely petition for rehearing and timely request for certification to the California Court of Appeal was denied.

The evidence is:

After dark, on March 9, 1975, sheriff officers found petitioner sitting on a curb near two motor vehicles and she appeared to have been involved in a collision between them. She appeared bruised, cut and injured about the face and head and displayed symptoms of being under the influence of an opiate, having scratches on her arm. There was also evidence from which it might have been inferred that her condition was not due to being "under the influence" but to striking her head against the windshield of a vehicle involved in the collision and that the

scratches were not due to a needle but to pet cats.

Petitioner was taken to the sheriff station and gave two urine samples to be tested for the presence of opiates in her body. The first sample was not urine but water and appeared to have been placed in the bottle by petitioner in privacy. The second sample was urine and was placed in the bottle by petitioner while under observation by a female officer.

The police chemist testified that a qualitative test detected the presence of morphine in the urine sample and that the test was so senstivite that if a quantity of morphine the size of a dust mote found its way into a sample or urine, the test would be positive. The police chemists also testified to facts from which it might be inferred that there had been either morphine or heroin in the body of the petitioner.

A sheriff's officer testified to the effect that petitioner had told him at the sheriff station that someone had given her a fix, i.e., injected her using a hypodermic needle and syringe with a narcotic or drug; and that while she had not injected herself, no force or duress had been used. Petitioner did not testify on her own behalf.

VII
ARGUMENT

A
CALIFORNIA HEALTH AND SAFETY CODE SECTION 11550 IS REPUGNANT TO THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION UNLESS IT CAN BE SO INTERPRETED AS TO REQUIRE A CRIMINAL STATE OF MIND CONSISTING OF (1) KNOWLEDGE THAT SOMETHING IS BEING PLACED WITHIN HIS PERSON AND (2) CONSENT TO IT BEING SO PLACED AND (3) SOME REASONABLE NOTICE OF THE NATURE OF THE SUBSTANCE THAT IS PLACED WITHIN HIS PERSON.

The first problem posed by this case arises because the defining criminal statute does three things: (a) It imposes a mandatory minimum jail sentence of 90 days if the defendant is found in a certain physical condition, i.e., the physical condition of being under the influence of any one of a long list of chemical substances; and (b) it is silent as to whether or not any particular state of mind must precede being in that physical condition; and (c) the language used does not explicitly prohibit the doing of any act or require the doing of any act.

The authorities dealing with the question of what mental element must be part of the

definition of a crime or whether any mental element is required at all where the defining criminal statute is silent or vague on the subject (at least those previously cited herein and, in fact, all authorities that petitioner has been able to find) all relate to crimes either forbidding an act or requiring an act and none discuss any crime involving a prohibition against being in a particular physical condition.

Accordingly, the answer to the question must be found in logic and first principles, aided by analogy with the authorities dealing with acts.

To begin with, it seems obvious that unless a person found to be in the forbidden condition (under the influence of a proscribed chemical substance) is in some measure responsible for being in that condition, mandatory incarceration in jail for a minimum 90 day period could serve no legitimate interest of the state, e.g., such as deterrence, public protection by removing the offender from circulation, even retribution or revenge or any other reasonable purpose of imposing criminal sanctions. Compare: Morisette v. U.S., supra, 342 U.S. at p. 251, footnote 5 and Williams v. New York, 337 U.S. 241, 93 L.Ed. 1337, 69 S.Ct. 1079; Felton v. United States, supra, stating at 96 U.S. 703: "But the law at the same time is not so unreasonable as to attach culpability, and consequently to impose punishment, where there is no intention to evade its provisions. . . ."

In short, in the absence of a showing of such responsibility, criminal sanction is irrational

and hence repugnant to due process under the Fourteenth Amendment to the United States Constitution. Accordingly, unless the state court can reasonably interpret the criminal statute as making responsibility on the part of defendant without knowledge or intent an element of the crime (even though in explicit terms the statute is silent or vague on the subject), the statute is unconstitutional.

With respect to the statute involved herein (California Health and Safety Code Section 11550), responsibility of the defendant necessarily implies, at the very minimum responsibility for the proscribed substance being within his or her physical system. It is the presence of the proscribed substance within the defendant's physical system that causes him or her to be in the forbidden condition, i.e., under the influence of the proscribed substance.

In turn, responsibility of the defendant for the forbidden substance being within his or her physical system can only exist if, at the very least, he or she knows that something is being placed within said physical system (an act) and in some manner agrees to this being done.

Responsibility also implies a third mental element, namely some reasonable notice of the nature of the substance that is placed within his or her person. California appellate tribunals have imported defendant's knowledge of the nature of the proscribed substance as an element of crimes involving external possession thereof even though the statutes in question are silent on

the subject. See: People v. Winston (1956) 46 Cal. 2d 151; People v. Redrick (1961) 55 Cal. 2d 282; People v. Sweeney (1944) 66 Cal. App. 2d 855; People v. Randolph (1933) 133 Cal. App. 192.

There is no reason why the same mental element should not be imported into a criminal statute prohibiting internal possession of such substances (internal possession being necessarily implied as an element of the crime because its definition is in statutory language being "under the influence of" the substance). Plainly, it would be irrational to place responsibility for having ingested a certain substance upon an individual if he or she had no idea of what it was that he or she had ingested.

Furthermore, since an act is an implicit element of the crime herein (i.e., the act of ingesting the substance of which being "being under the influence of" is forbidden), the cases and authorities previously distinguished as applying only to crimes involving "acts" also apply to California Health and Safety Code Section 11550. It appears from these authorities that a "criminal" or "bad" mental state must precede or co-exist with the implicit act defined by the latter statute because: (a) it is not involved with a business regulatory measure, or with a public safety measure involving food adulteration or a pollution offense or a moral offense involving a minor victim such as statutory rape or selling alcoholic beverages to a minor or an offense traditionally associated with "criminal negligence" or a minor traffic offense or the like; and (b) the punishment

is not a small fine but very severe involving a mandatory 90 day jail sentence (compare California Vehicle Code Section 23105 which punishes driving under the influence of any drug, including those involved in Health and Safety Code Section 11550 violations, by giving the sentencing judge discretion as to the length of the jail sentence or to impose no jail sentence).

To sum up: Even though Health and Safety Code Section 11550 in terms punishes only a physical condition, it implicitly requires the doing of an act. Because it is not one of those relatively minor regulations imposing a small fine where it makes sense, in order to achieve the objective of the statute, to impose an "absolute criminal liability" irrespective of the offender's state of mind, this statute is repugnant to the due process clause of the Fourteenth Amendment to the United States Constitution unless state courts can reasonably import into it a requirement of a "bad" or "criminal" mind on the part of the defendant and this mental element consists of at, the very minimum, the following: (1) knowledge that something is being placed within the defendant's person; and (2) consent of the defendant to the substance being so placed; and (3) some reasonable notice of the nature of the substance that is placed within the defendant's person.

B

FAILURE OF THE TRIAL JUDGE TO GIVE A JURY INSTRUCTION DEFINING THE REQUIRED STATE OF MIND AS AN ESSENTIAL ELEMENT TO BE PROVED BY THE PEOPLE BEYOND A REASONABLE DOUBT BEFORE DEFENDANT CAN BE FOUND GUILTY, WAS REVERSIBLE ERROR, NO MATTER HOW PURPORTEDLY STRONG THE EVIDENCE IN FAVOR OF SUCH CRIMINAL STATE OF MIND MAY APPEAR TO BE TO THE TRIAL JUDGE.

As previously indicated the trial judge, since defendant's conviction, has expressed doubt as to whether or not he was correct in refusing to give a jury instruction encompassing some concept of a "bad" or "criminal" mind and as to what, if he were so incorrect, a proper jury instruction on this subject should contain; the prosecution in its brief on the appeal took the position that the trial judge was incorrect in failing to give such a jury instruction (without giving an opinion as to what it should properly contain) but argued in effect that whatever the requisite criminal state of mind might be, the evidence was so strong that the error in failing to give a jury instruction on the subject was harmless; and the Appellate Department of the Superior Court of the State of California for the County of Ventura simply affirmed the judgment of conviction and sentence below without written opinion, thus, giving no reasoning.

However, as shown above, a minimal criminal state of mind on the part of the defendant was essential if the convicting criminal statute is to avoid repugnance to due process.

Therefore, the question arises whether failure to give the required jury instruction, especially upon defendant's request, is not a ground for reversal because of some harmless error principle. Defendant urges that the question must be answered in the negative and that there is no basis for application of harmless error principles to defeat reversal, for three reasons.

> FIRST. "However clear the proof may be, or however incontrovertible may seem to the judge to be the inference of a criminal intention, the question of intent can never be ruled as a question of law, but must always be submitted to the jury. Jurors may be perverse; the ends of justice may be defeated by unrighteous verdicts, but so long as the functions of the judge and jury are distinct, the one responding to the law, the other to the facts, neither can invade the province of the other without destroying the significance

> of trial by court and jury. . . ." People v. Flack, 125 N. Y. 324, 334, 26 N. E. 267, 11 L. R. A. 807 (cited with approval and relied upon in Morisette, supra, at 342 U. S. 274).

Here, by refusing to give the requisite instruction on criminal intent and state of mind, the trial judge effectively removed that issue from the jury's deliberations and any effort to refuse to give effect to the error upon some harmless error theory, in effect, validates the trial judge's erroneous action. Accordingly, failure to give the instruction violates the policy of the Sixth Amendment to the United States Constitution as made applicable to the several states by the Fourteenth Amendment to the United States. This constitutional policy, is thus a policy that the jury must be so instructed by the trial judge on all general principles necessary for the jury's understanding of the case. Compare: People v. Wilson (1967) 66 Cal. 2d 749, 759.

Obviously, the law governing the requisite mental element of the crime is a basic principle among the general principles necessary for the jury's understanding of the case. In Faretta v. California, 422 U. S. 806, 45 L. Ed. 562, 95 S. Ct. 2525, this Honorable Court established once and for all the principle that where a fundamental principle of policy of constitutional law pertaining to a criminal case is violated, and in Faretta without reference to the effect of the violation upon the truth-determining process of the trial, the error is reversible per se and the conviction cannot be saved by reference to a harmless error

rule. Compare: People v. McDaniel, 16 Cal. 3d 156, 168. A fortiori in the instant case reversal must take place since the lack of any instruction whatsoever on criminal intent and/or criminal knowledge affected the truth-determining process of the jury.

Hence, the error of the trial judge herein in refusing to give jury instructions appropriately defining the mental element of the crime involved is error reversible per se and harmless error rules are irrelevant and have no application.

SECOND. Apart from the above considerations, if a harmless error rule is to be applied at all, it must be the Federal harmless error rule of Chapman v. California, 386 U.S. 18, 24 and Fahy v. Connecticut, 375 U.S. 85 because, as above indicated, the error is of constitutional dimensions. Under the Chapman-Fahy rule an error of constitutional dimensions is ground for reversal unless it is harmless beyond a reasonable doubt.

Here, the evidence was that:

(1) Defendant purportedly admitted to a sheriff officer that she had a "fix" administered by others not using duress and in the opinion of the "expert" officer in the argot of narcotic users, a "fix" involves ingestion of an opiate by means of needle injection.

(2) Defendant was under the influence of heroin or morphine; and

(3) Defendant attempted to hide the fact that she was "under the influence" by offering a bottle of water to be tested by the officers instead of the actual urine requested.

In the first place, the admission (1) is equivocal. There was no evidence that defendant was a habitual narcotic user or indeed had been under the influence of a narcotic more than this one time in her life. The detailed circumstances of the purported "fix" and the purported admission were not given to the jury. The fact and text of the admission are a matter of the credibility of the testifying police officer and on appeal his demeanor in testifying is not before the reviewing court but was before the jury. In fact, the record itself is one extra step removed from what the jury heard and observed because it is not a reporter's transcript but a controverted engrossed "settled statement," i.e., a summary of the evidence settled by the trial judge.

Plainly, under these circumstances, it cannot rationally be concluded beyond a reasonable doubt that if the jury had been called upon to decide whether the purported admission (1) proved the requisite mental element, it would have decided against defendant.

Again, the evidence, (3), supra, that defendant purportedly attempted to hide that she was "under the influence" does not necessarily create an inference that she had the requisite mental state to make being "under the influence" a crime.

Finally, the mere fact that defendant was "under the influence" as a matter of constitutional law cannot lead to an inference of the requisite mental element. A conclusive inference, i.e., one meeting the requirement of the Chapman-Fahey rule of an inference beyond a reasonable doubt, would "prejudge a conclusion which the jury should reach of its own volition" and "would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to very element of the crime. Such presumptions are not to be improvised by the judidiary." Morisette v. United States, supra, at 342 U.S. 275-276. Compare: Tot v. United States, 319 U.S. 463, 87 L.Ed. 1519, 63 S.Ct. 1241 relied upon in Morisette.

It follows that even under the Chapman-Fahey harmless error rule, the error with respect to not giving a state-of-mind jury instruction requires reversal.

THIRD. Defendant, as an indigent, made a motion for a transcript of the trial proceedings to be prepared at state expense for the purpose of appeal. The trial judge denied the motion on the basis that an engrossed settled statement was all that was necessary because the only real issue was whether California Health and Safety Code Section 11550 could be constitutionally interpreted as not requiring any mental element at all, i.e., that therefore any detailed reporting of the testimony was unnecessary, even though defendant claimed that there was a danger that the summary of the record provided by an engrossed settled statement on appeal

might cause an appellate tribunal to hold that the error was harmless because of not having a chance to review cross-examination of prosecution witnesses tending to discredit their testimony, especially that of the officer testifying to the admission.

The unfairness of the prosecution in then arguing to the appellate tribunal just what defendant feared, especially when the appellate tribunal did not write an opinion indicating the thrust of its reasons denying the appeal, is apparent and of sufficient magnitude to constitute a violation of the due process clause of the Fourteenth Amendment to the United States Constitution.

The point is that it is unreasonable for the prosecution to take advantage of a procedural trick it, itself, created by opposing a reporter's transcript. Hence, a violation of due process occurred and Certiorari should be granted on this point alone and independent of the mental element point.

CONCLUSION

Because of the foregoing, and the serious Federal constitutional issues concerning conviction for crime when the jury is given no instruction whatsoever on mental state, Certiorari should be granted.

Respectfully submitted,
IRVING A. KANAREK
Counsel for Petitioner

APPENDIX A

JUDGMENT OF APPELLATE DEPARTMENT OF SUPERIOR COURT (NO OPINION)

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF VENTURA
APPELLATE DEPARTMENT

F I L E D
Sep 28 1976
Robert L. Hamm, County Clerk
By /s/ Adele Beardsley
Deputy County Clerk

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff/Respondent vs. KRISTINA KAY HAYDOCK, Defendant/Appellant.	) No. APP-548) (Municipal Court) No. T-03411)) JUDGMENT) (On appeal from) the Municipal) Court of Ventura) County Camarillo Department)

The above-entitled cause having been fully argued, submitted and taken under advisement, IT IS ADJUDGED that the judgment of the Municipal Court be and hereby is affirmed.

/s/ Marvin H. Lewis
MARVIN H. LEWIS
Presiding Judge of the Superior Court
Appellate Department

/s/ Richard C. Heaton
RICHARD C. HEATON
Judge of the Superior Court
Appellate Department

/s/ Steven J. Stone
STEVEN J. STONE
Judge of the Superior Court
Appellate Department

DATED: Sep 28 1976

APPENDIX B

ORDER DENYING PETITION FOR REHEARING AND REQUEST FOR CERTIFICATION

STATE OF CALIFORNIA
COUNTY OF VENTURA
APPELLATE DEPARTMENT

DATE:	October 13, 1976	TIME: 11:00 a.m.
	RICHARD C. HEATON	JUDGE
	STEVEN J. STONE	JUDGE
Hon.	MARVIN H. LEWIS, Presiding	JUDGE
	Adele Bearsley	Deputy County Clerk
		Deputy Sheriff
		Court Reporter

THE PEOPLE OF THE STATE OF CALIFORNIA,

No. APP-548 VS. Counsel for Plaintiff

KRISTINA KAY HAYDOCK

Counsel for Defendant

NATURE OF PROCEEDINGS: ORDER DENYING PETITION FOR REHEARING AND REQUEST FOR CERTIFICATION

Appellant's Petition for Rehearing and Request for Certification to the Court of Appeal having heretofore been submitted to the Court for consideration and decision, and the Court having duly considered the same, now orders that said petition and said request are each hereby denied.

ROBERT L. HAMM, County Clerk By /s/ Adele Beardsley
Deputy County Clerk

CIVIL MINUTES

APPENDIX C

CALIFORNIA STATUTES

CALIFORNIA HEALTH & SAFETY CODE §11550

§ 11550. Unlawful acts; exception; burden of defense; punishment; probation

No person shall use, or be under the influence of any controlled substance which is (1) specified in subdivision (b) or (c) of Section 11054, specified in paragraph (10), (11), (12), or (17) of subdivision (d) of Section 11054, or specified in subdivision (b) or (c) of Section 11055 or (2) which is a narcotic drug classified in Schedule III, IV, or V, excepting when administered by or under the direction of a person licensed by the state to dispense, prescribe, or administer controlled substances. It shall be the burden of the defense to show that it comes within the exception. Any person convicted of violating any provision of this section is guilty of a misdemeanor and shall be sentenced to serve a term of not less than 90 days nor more than one year in the county jail. The court may place a person convicted hereunder on probation for a period not to exceed five years and shall in all cases in which probation is granted require as a condition thereof that such person be confined in the county jail for at least 90 days. In no event does the court have the power to absolve a person who violates this section from the obligation of spending at least 90 days in confinement in the county jail. (Added by Stats. 1972, c. 1407, p. 3031, §3. Amended by Stats. 1973, c. 1078, p. 2187, § 27, eff. Oct. 1, 1973.)

CALIFORNIA VEHICLE CODE
§23105

§ 23105. Influence of drug or addiction

(a) It is unlawful for any person who is under the influence of any drug to drive a vehicle upon any highway.

(b) It is unlawful for any person who is under the influcence of any drug to drive a vehicle upon other than a highway.

The department shall not be required to provide patrol or enforce the provisions of this subdivision.

(c) It is unlawful for any person who is addicted to the use of any drug, except such a person who is participating in a methadone maintenance treatment program approved pursuant to Article 3 (commencing with Section 4350) of Chapter 1 of Part 1 of Division 4 of the Welfare and Institutions Code, to drive a vehicle upon any highway.

(d) Any person convicted under this Section shall be punished upon a first conviction by imprisonment in the county jail for not less than 48 hours nor more than six months or by fine of not less than two hundred fifty dollars ($250) nor more than five hundred dollars ($500) or by both such fine and imprisonment. If, however, any person so convicted consents to participate, and does participate and successfully completes, a driver improvement program

or a treatment program for persons who are habitual users of drugs, or both such programs, as designated by the court, a court shall punish such person by a fine of not less than one hundred fifth dollars ($150) nor more than five hundred dollars ($500) or by imprisonment in the county jail for not less than 48 hours nor more than six months or by both such fine and imprisonment.

(e) Any person convicted under this section shall be punished upon a second or any subsequent conviction, within five years of a prior conviction, by imprisonment in the county jail for not less than 48 hours nor more than one year and by a fine of not less than two hundred fifty dollars ($250) nor more than one thousand dollars ($1,000). A conviction under this section shall be deemed a second or subsequent conviction if the person has previously been convicted of a violation of driving a vehicle while under the influence of intoxicating liquor or any drug, or under the combined influence of intoxicating liquor and any drug.

(f) If any person is convicted of a second or subsequent offense under this section within five years of a prior conviction and is granted probation, it shall be a condition of probation that such person be confined in jail for at least 48 hours but not more than one year and pay a fine of at least two hundred fifty dollars ($250) but not more than one thousand dollars ($1,000).

(g) In no event does the court have the power to absolve a person who is convicted of a second or subsequent offense under this section

within five years of a prior conviction from the obligation of spending at least 48 hours in confinement in the county jail and of paying a fine of at least two hundred fifty dollars ($250) except as provided in subdivision (h).

(h) Except in unusual cases where the interests of justice demand an exception, the court shall not strike a prior conviction of an offense under this section for purposes of sentencing in order to avoid imposing as part of the sentence or term of probation the minimum time in confinement in the county jail and the minimum fine, as provided in subdivision (g).

When such a prior conviction is stricken by the court for purposes of sentencing, the court shall specify the reason or reasons for such striking order.

On appeal by the people from such an order striking such a prior conviction it shall be conclusively presumed that such order was made only for the reasons specified in such order and such order shall be reversed if there is no substantial basis in the record for any of such reasons.

(i) The court may order that any person convicted under this section who is punished by imprisonment in jail, be imprisoned on days other than days of regular employment of the person, as determined by the court.

(j) If the person convicted under this section is under the age of 21 years and the

vehicle used in any such violation is registered to such person, the vehicle may be impounded at the owner's expense for not less than one day nor more than 30 days.

(Added by Stats. 1971, c. 1530, p. 3027, § 16, operative May 3, 1972. Amended by Stats. 1972, c. 579, p. 1016, § 48; Stats. 1972, c. 92, p. 121 § 7; Stats. 1973, c. 1128, p. 2297, § 5; Stats. 1974, c. 545, p. 1331, § 217.)

IN THE

Supreme Court of the United States

October Term, 1976
No. 76-816

KRISTINA KAY HAYDOCK,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari to the Appellate Department of the Superior Court of California, for the County of Ventura

BRIEF OF RESPONDENT IN OPPOSITION

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Opinion Below

Petitioner's conviction was affirmed by the Appellate Department of the Superior Court of California for the County of Ventura on September 28, 1976. (Appendix A.) The same court denied petitioner's request for rehearing and for certification to the California Court of Appeal on October 13, 1976. (Appendix B.) No written opinion was rendered.

Jurisdiction

The jurisdiction of this Court is apparently invoked pursuant to 28 U.S.C. § 1257(3).

Questions Presented

1. Whether petitioner was denied due process of law under the Fourteenth Amendment of the United States Constitution when she was convicted of being under the influence of heroin in violation of California Health and Safety Code section 11550 and given a mandatory 90 day jail sentence under that statute without the jury being instructed on criminal intent.

2. Whether petitioner was denied the right to a fair jury trial under the Sixth and Fourteenth Amendments of the United States Constitution when the trial judge denied a request for the jury to be instructed on criminal intent.

3. Whether petitioner was denied due process of law under the Fourteenth Amendment of the United States Constitution when the trial judge denied her request for a free transcript of the trial proceedings.

Statement of the Case

In a complaint filed on March 20, 1975, by the District Attorney of Ventura County, State of California, petitioner was charged with unlawfully using or being under the influence of heroin in violation of California Health and Safety Code section 11550.

Petitioner's pretrial motion to provide a court reporter and her demurrer to the complaint were denied. A plea of not guilty was entered on her behalf. Thereafter, petitioner's renewed motion to provide a court reporter and her demurrer to the complaint were denied. Petitioner's motion to dismiss the complaint was denied.

On June 10, 1975, following a trial by jury, petitioner was found guilty as charged in the Municipal Court of Ventura County.

On July 1, 1975, petitioner's motion for a new trial was denied. Petitioner was placed on summary probation for a period of two years on terms and conditions, including that she spend 90 days in the county jail.

On appeal, petitioner's conviction was affirmed by the Appellate Department of the Superior Court of California for the County of Ventura on September 28, 1976. The same court denied petitioner's request for rehearing and for certification to the California Court of Appeal on October 13, 1976.

The instant Petition for Writ of Certiorari was filed on December 14, 1976.

Statement of Facts

On March 9, 1975, petitioner and a male companion, Stephen Strong, went to the Colonia district of Oxnard, California, for the purpose of obtaining and injecting heroin. Having succeeded in that purpose, they proceeded through the city of Thousand Oaks, California, in petitioner's vehicle.

In Thousand Oaks, the vehicle struck a parked vehicle. Ventura County Deputy Sheriffs Western and Godfrey responded to the scene of the accident, along with two fire department vehicles. Deputy Godfrey interviewed Strong and Deputy Western interviewed petitioner. Following these conversations, the deputies formed the opinion that Strong and petitioner were under the influence of heroin. They then verified each other's opinion as to each person.

Strong and petitioner then accompanied the deputies to a Ventura County Sheriffs' Office. At the sheriffs' office, petitioner was examined by Deputy Sheriff Whitmeyer, a narcotic expert. Deputy Whitmeyer also formed the opinion that petitioner was under the influence of heroin, and arrested her for violation of California Health and Safety Code section 11550.

At the sheriffs' office, petitioner agreed to provide a urine sample. She apparently "dipped" the sample out of the toilet, as it was found to be water. She later gave an actual urine sample which was found to contain morphine.

Petitioner was advised of her *Miranda* rights, stated that she understood those rights, and agreed to talk to the deputies without an attorney present. Thereafter, petitioner admitted using heroin in the Colonia district of Oxnard.[1]

[1]At a hearing outside the presence of the jury, petitioner denied having ever been admonished as to her rights. The trial court ruled that her statements were admissible.

ARGUMENT

I

Failure to Instruct on Intent Was Harmless

Petitioner contends that she was denied due process of law and the right to a fair jury trial when the trial judge denied a request to instruct the jury on the joint operation of act and general intent. She bases this contention on the arguments that California Health and Safety Code section 11550 is repugnant to the due process clause of the Fourteenth Amendment unless it can be interpreted to require a criminal state of mind, that it was reversible error to remove this element from the jury's consideration, and that the mandatory minimum 90 day jail sentence imposed by the statute denies a defendant due process of the law absent a finding of criminal intent. Respondent submits that failure to give the instruction was harmless error.

That trial judge denied both the defense and prosecution's request to instruct the jury on general intent. With respect to the elements of the offense, the jury was instructed that:

> "Every person who is under the influence of any controlled substance, such as heroin, as charged in the complaint, is guilty of a misdemeanor.
>
> "If a controlled substance is appreciably affecting the nervous system, brain, muscles, or other parts of a person's body, or is creating in him any perceptible abnormal, mental or physical condition, such a person is under the influence of a controlled substance." CALJIC No. 16.060.

The settled statement on which this matter was appealed to the Appellate Division of the Superior Court of the State of California, clearly shows that even if the jury had been instructed on general intent in addition to the basic elements of the offense, the verdict would have been the same. The evidence was overwhelming that petitioner either caused a controlled substance to be placed within her person or had knowledge that it was being placed within her person and consented to it. The evidence was also overwhelming that petitioner had knowledge of the nature of the substance. Clearly, the evidence showed that petitioner intentionally did an act proscribed by California Health and Safety Code section 11550, and that is all that is required to show general intent.

The evidence established that petitioner exhibited all of the primary signs of narcotics usage. Petitioner attempted to cover up the fact that she was under the influence of heroin by filling a urine sample bottle with water and submitting it as her own urine sample. Her extrajudicial admissions were introduced which included the statement that she had been injected with heroin by someone else and that there was no force or duress used in the fixing. *No* evidence was offered to dispute the overwhelming evidence that petitioner intended to do the acts proscribed by California Health and Safety Code section 11550.

It is axiomatic that where it is clear beyond a reasonable doubt that a result more favorable to a defendant would not have occurred were there no error, the error is harmless. Under such circumstances, reversal is not warranted. *Chapman v. California,* 386 U.S. 18, 24, 17 L.Ed.2d 705, 87 S.Ct. 824 (1967); *United States v. Nasse,* 432 F.2d 1293, 1303 (7th

Cir. 1970); *Pasterchik v. United States,* 400 F.2d 696, 699-700 (9th Cir. 1968). The *Chapman* standard is applied where evidence is so overwhelming in favor of guilt that it cannot be said that the error contributed to petitioner's conviction. *See Harrington v. California,* 395 U.S. 250, 252-54, 23 L.Ed.2d 84, 89 S.Ct. 1726 (1969).

Petitioner maintains that the instant error cannot be deemed "harmless" because the question of intent must always be submitted to the jury and failure to do so is reversible error *per se.* (*See* Petn. 16-19.) She cites, as authority for this position, *Morissette v. United States,* 342 U.S. 246, 274, 96 L.Ed. 288, 72 S.Ct. 240 (1952), *citing People v. Flack,* 125 N.Y. 324, 334; 26 N.E. 267, 270. (*See* Petn. 17-18.) In *Morissette* the question of intent was taken from the jury's determination by an instruction that the law raises a presumption of criminal intent from the act and by a statement by the trial court which specifically precluded the defendant from raising an affirmative defense to the question of intent even though there was testimony that would have supported such a defense. *Morissette v. United States, supra* at 248-49, 273-74. Thus, the case stands for the proposition that it was error to create a conclusive presumption which could not be rebutted by testimony and effectively eliminated intent as an ingredient of the offense. *Id.* at 275. To that end, the court endorsed the state court's position in *Flack* that where intent is an element, it is to be submitted to the jury. *Id.* at 274.

Respondent does not quarrel with the proposition that the jury should be instructed on general intent on offenses such as the one at bar. However, respondent maintains that the case law does not support the conten-

tion that failure to so instruct is *per se* error. Such a standard would be tantamount to a rule of automatic reversal whenever a technical error occurred in instructing the jury. That is not the test of harmless error, and, in fact, would effectively abolish the concept of harmless error.

This is not a case where a state court has set forth a rule which might be contrary to the United States Constitution and thus, deny future defendants federal rights. The decision of the Appellate Department of the Superior Court of the State of California was rendered without a written opinion and has no precedential effect. In the context of the instant controversy, any error was harmless.

II

Petitioner Was Not Prejudiced by Having to Appeal the Case on an Engrossed Settled Statement of Facts

As part of her argument that failure to give an instruction on general intent was not harmless error, petitioner maintains that she was prejudiced by not having the benefit of a free transcript of the proceedings in the trial court. Her argument is that a summary of the record provided by an engrossed settled statement on appeal might cause an appellate court to hold that any error was harmless because of not having a chance to review cross-examination of prosecution witnesses. (Petn. 21-22.) Respondent submits that there is no merit in petitioner's position.

Petitioner does not set forth any errors or omissions in the settled statement which went before the state appellate courts. She does not claim that a transcript would provide any specific information in support of her contentions on appeal. Without objection to the content of the settled statement, petitioner's argument is meritless.

Under California Rules of Court, on appeal from a conviction in the municipal court, a defendant must "specify the grounds on which he intends to rely upon appeal and set forth so much of the evidence and other proceedings as are necessary for a decision upon said grounds." Cal. Rules of Court, Rule 184(b). Petitioner does not claim that she set forth any grounds or evidence which were not included in the settled statement. The settled statement included a summary of the testimony of all the witnesses at trial. Respondent submits that this was sufficient for the reviewing court.

Moreover, petitioner has failed to assert a basis for providing her with a *free* transcript of the proceedings, which is what she requested in the trial court. Under some circumstances, an indigent defendant is entitled to a free transcript. *Mayer v. City of Chicago*, 404 U.S. 189, 193-99, 30 L.Ed.2d 372, 92 S.Ct. 410 (1971). In fact, under California law, once an indigent defendant makes a showing that a settled statement is insufficient, the burden shifts to the people to show that it is sufficient. *March v. Municipal Court*, 7 Cal.3d 422, 428-31, 498 P.2d 437, 102 Cal.Rptr. 597 (1972). Petitioner does not set forth that any showing of indigency was made at the trial court, and, under California law, there must be some affirmative showing of indigency. *People v. Westbrook*, 57 Cal.App.3d 260, 262-64, 129 Cal.Rptr. 143 (1976). Respondent submits that this procedure is consistent with federal constitutional rights.

The state must provide an indigent defendant with a record of sufficient completeness to permit the proper consideration of his contentions. This rule does not automatically require a complete verbatim transcript, but may be complied with by a settled statement of facts, agreed to by both sides. *Mayer v. City of Chicago, supra* at 194-95; *Williams v. Oklahoma City,* 395 U.S. 458, 459-60, 23 L.Ed.2d 440, 89 S.Ct. 1818 (1969); *Draper v. Washington,* 372 U.S. 487, 495-96, 9 L.Ed.2d 899, 83 S.Ct. 774 (1963). That is what occurred in the instant case.

Respondent submits that petitioner was not prejudiced by having to appeal the case on an engrossed settled statement of facts.

Conclusion

For the foregoing reasons, respondent urges that the petition for writ of certiorari be denied.

Respectfully submitted,

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